IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

SECOND APPEAL NO. 335 OF 1989

Smt. Thakubai Muralidhar Valunj ... Appellant.
(Orig.Deft.No.2)

Versus

1) Eknath Kisan Kashikedar.

2) Sudhakar Kisan Kashikedar.

3) Raju Kisan Kashikedar.

4) Smt.Jayawantabai Kisanhari Kashikedar

5) Kisan Hari Kashikedar

6) Baban Rakhama Valunj. ..... Respondents.
(Orig.Plaintiffs and Deft. Nos.1. and 3.)

Smt. S. B. Gunjal for the Appellant.

Mr. S. S. Pandit for Respondent Nos.1 and 2.

CORAM : ANOOP V. MOHTA, J.

DATED : 1ST DECEMBER, 2005.

J U D G E M E N T :

This is a second appeal filed by original defendant No.2, challenging the judgment and decree passed by the learned District Judge, Pune (first appellate court) dated 30th November, 1988 passed in Civil Appeal No. 303 of 1984 thereby, set aside the judgment and decree dated 6th January, 1984 passed by the learned Civil Judge, (Junior Division), Junnar (trial court) in Regular Civil Suit No. 170 of 1974.

2. The appellant along with one Baban Rakhama Valunj, original defendant No.1, purchased a property bearing Survey No. 223/1 admeasuring 8.5 acres situated at Village Vadgaon Anand, Tal. Junnar, District Pune (suit property) by executing a sale deed dated 5th October, 1974 with original defendant No.3. As per record original plaintiff Nos.1 to 4 (respondent Nos.1 to 4) on 17th October, 1974 filed a suit in question, alleging that the appellant along with one Baban forcefully entered the suit premises. Their main prayer was for declaration and injunction. On 17th March, 1975, original defendant No.3 remained absent, therefore, exparte decree was passed against him. On 30th April, 1982 original plaintiffs sought amendment to the plaint and inserted para in reference to the partition and possession of the suit property as an

alternative plea. On 17th July, 1982, original defendants appeared and filed their written statement. The parties led evidence and after considering the material on record, the learned trial Judge on 6th January, 1984 dismissed the suit.

3. The trial court held that the plaintiffs failed to prove that they were in actual possession of the suit land; the Sale deed executed by defendant No.1 was not binding; defendant No.3 was not competent to execute the sale deed being mentally weak; defendant Nos.1 and 2 had no right or title or interest in the suit property on the basis of the sale deed; defendant Nos.1 and 2 illegally obstructed the possession of plaintiffs on 11th August, 1974. The trial court, therefore, rejected the relief of injunction and declaration that sale deed by defendant No.3 was not legal and valid. The trial Court further held that plaintiff Nos.1 and 2 proved that defendant No.3 sold the suit property as legal necessity for the benefit of joint family. The trial court further held that defendant Nos.1 and 2 proved that defendant No.3 actually handed over possession of the suit property on execution of sale deed on 5th October, 1974. Based on this, the additional issue about plaintiffs'

entitlement to partition and possession and their respective share was not considered.

4. Being aggrieved by the same, original plaintiffs (respondent Nos.1 to 4) preferred appeal before the District Judge, Pune. The appellate court has reversed the finding of the trial court and held that the transaction of sale deed (Exh. 97) dated 5th October, 1974 of the suit property is liable to be set aside for want of legal necessity but not in its entirety and therefore decreed and declared that the sale deed dated 5th October, 1974 executed by respondent No.3 in the appellate court - Kisan Hari Kashikedar, in respect of the suit property in favour of respondent No.2 - original defendant No.2 - Thakubai Murlidhar Valunj (appellant herein) has not been executed by defendant No.3 in his capacity as a father - manager of the Joint Hindu Family for any legal necessity. It is, therefore, not binding on plaintiff Nos.1 to 4 and is valid only in the favour of defendant No.2 (appellant herein) to the extent of defendant No.3’s 1/5th share therein. The appellate court has further declared and decreed that original plaintiff Nos.1 to 4 have together 4/5th share in the suit property. The court thereby passed the order for

partition by metes and bounds with further direction of separate possession of their 4/5th share. The inquiry into the mesne profits has also been awarded. The appellate court has, therefore, held that there was no legal necessity established by the defendants. The appellate court has further observed that original plaintiffs failed to prove that on the date of filing of the suit they were in possession of the suit property.

5. Therefore, the present second appeal by the original defendant No.2 - appellate herein, which was admitted on 15th June, 1989 on following question of law:

> "Whether the legal necessity for the transaction is prove and second the effect of the death of plaintiff No.4 pending the first appeal."

6. As per the record, name of respondent No.4 (plaintiff No.4) - Smt.Jayawantabai Kishanhari Kashikedar was deleted by order dated 15th June, 1989 from the array second appeal in question. The appellate court, while consider the merits of the

appeal, has taken into consideration the share of original plaintiff No.4 - respondent No.4 (died on 4th February, 1985) and decreed the suit in respect of plaintiff Nos.1 to 4. In this second appeal, respondent Nos.1 to 3 are sons of respondent No.4 i.e. mother (now dead) and original defendant No.3 Kisan Hari Kashikedar i.e. respondent No.5 (father) in this second appeal. There is no dispute, therefore, that all the legal heirs of Jayawantabai, original plaintiff No.4, were already on the record and therefore it no way affects the merits of the reasoning given by the appellate court. The present second appeal stands dismissed as per order dated 7th June, 2004 against Kisan Hari Kashikedar, respondent No.5 herein - original defendant No.3. As noted the suit was exparte even otherwise against respondent No.5 - Kisan Hari Kashikedar by an order of the trial court dated 17th March, 1975. There is no counter challenge or cross appeal preferred by the original plaintiff or respondent Nos.1 to 4. Therefore, the impugned order is final and binding in so far as plaintiffs are concerned. There was no challenge of any kind made by respondent No.5 / defendant No.3 against the impugned judgment and decree.

7. Learned Counsel appearing for respondent Nos.1 and 2 supported the judgment and decree passed by the appellate court. In this background as the appellate court in reversal order observed, based on the Sale Deed dated 5th October, 1974 and the material on the record that there was no legal necessity established by the respondents; there is no material to justify any legal necessity to enter into the transaction in question. This finding based on the evidence led by the parties is correct. All the evidence led by both the parties has been rightly considered and concluded by the appellate court in so far as the issue of legal necessity is concerned. Even though the learned Counsel appearing for the appellant tried to raise the issue about the mental incapacity and/or incapacity of the original defendant No.3 in question, but in view of the fact that that point was not raised by the learned advocate appearing for the defendants, at the relevant time, as reflected in the judgment of the appellate court, it is not acceptable now in this second appeal. I cannot overlook at this stage the fact that defendant No.3 was absent and decree was passed exparte against him. This appeal against the said defendant was dismissed. Therefore, in the absence of any contrary material on record for all the

purposes the appellate court comes to right conclusion that original defendant No.3 was in sound state of mind when he had entered into the transaction in question. Therefore, as the issue of legal necessity for entering into transaction failed, the transaction, however, declared valid by the appellate court, rightly, so far as share of defendant No.3 i.e. 1/5th share of the relevant time. In the result, the appellate court has rightly declared and decreed the share of plaintiff Nos.1 to 4 to the extent of 4/5th share in the suit property of the relevant time and it was accordingly directed to partition and to give separate possession of their respective shares. Therefore, as the appellate court comes to a right conclusion based on the material evidence on record and the view as expressed has foundation of evidence led by the parties and according to me it is reasonable and correct view. Therefore, the appellate court committed no error while rejecting the case of legal necessity. Therefore, answer to the first question of law as framed, I am of the view that the appellate court is right by holding that the legal necessity for the transaction in question was not proved. The first part of the question of law is answered accordingly.

8. Based on the above reasoning itself, I am of the view that as and on the date of Sale Deed in question, whatever the share of Kisan i.e. original defendant No.3, has been partitioned and rightly decreed by the appellate court. Therefore, the appellant and one Baban i.e. respondent No.6 - defendant No.1 are entitled to the share of Kisan i.e. 1/5th share of the suit property in question. The remaining share i.e. 4/5th share as decreed and awarded should go in favour of the original plaintiff Nos.1 to 4. Now as the original plaintiff No.4 expired, pending first appeal, I am of the view that it should not disturb the 1/5th share as awarded by the appellate court in favour of the appellant. There is no question of disturbing the reasoning as well as judgment and decree awarded by the appellate court at this second appeal stage. In view of this second part of the question of law is also answered according that the judgment and decree passed by the appellate court will not affect because of the death of plaintiff No.4 - respondent No.4 pending the first appeal, specially at the instance of the purchaser of the property like appellant.

9. In view of the above background and reasoning, the contention of the appellant that the suit as such, was not maintainable unless the minor attain the majority and the filing of the suit by the mother at the instance of the minors, therefore, not maintainable are not acceptable. This submission has no foundation, as admittedly on the date of filing of the suit, apart from plaintiff No.4, plaintiff No.1 Eknath was major. Therefore, this contention has no force and is rejected accordingly.

10. Learned Counsel appearing for the appellant has relied on the case of **Sri Narayan Bal & Ors. vs. Sridhar Sutar and Ors.** (AIR 1996 SC 2371) and contended that previous permission of the court was necessary before disposing of the suit in view of the provisions of Hindu Minority and Guardianship Act and specially Section 8 of the Act and when question is of Joint Hindu Family property in which minor has an undivided share and same was sold by the karta. The facts and circumstances of the present case is totally distinct and distinguishable as referred above. The appellate court in the present case in fact held that there was no legal necessity to transfer the property. But restricted the Sale Deed in respect of share of

original defendant No.3. Learned Counsel has also relied on the case of **Narayan Laxman Gilankar vs. Udaykumar Kashinath Kaushik & Ors.,** (1993 Mh.L.J. 1653) for the same contention. The fact of that case is also distinct and distinguishable as there was no question of acceptance of sale of joint family property for the legal necessity as observed by the appellate court in the present case.

11. Learned Counsel appearing for the appellate further contended that the suit was filed initially only for injunction and not for any other relief or declaration. In **Ram Saran and Anr. vs. Smt. Ganga Devi,** (AIR 1972 SC 2685) the Apex Court has considered Section 42 of the Specific Relief Act and observed that when the party is in possession of some of the suit properties and the other party in his suit does not seek possession of suit property but merely claim a declaration that he is owner of the suit property, such suit is not maintainable. This proposition of law is correct. However, in the present case, the appellate court has observed that plaintiffs failed to prove possession of the suit property. In the present case, it is further observed that by an amendment alternatively the prayer was sought for partition and

position. Therefore, in the facts and circumstances of the case, this contention has also no force.

12. There is no doubt that pure question of law based on the material on record on admitted facts, if raised for the first time in the second appeal, such question can be considered by the appellate court in second appeal. The Bombay High Court in **Dattatraya Ramchandra Kulkarni vs. Baburao Dattu Mali & Anr.,** (2001 (Supp.) Bom.C.R. 270) based on various judgements held in reference to power of High Court to frame the question of law at the time of hearing though it was not framed when appeal was admitted. In Dattatraya Ramchandra Kulkarni **(Supra)** it was held that it is necessary to prevent injustice to litigant to consider such substantial question of law raised for the first time even at the time of hearing. In **Balkrishan and Anr. vs. Mohsin Bhai and Ors.,** (AIR 1999 M.P. 86) as relied, therefore, need no further discussion on this legal submission. Based on this foundation, the learned Counsel appearing for the appellant tried to agitate above issues and submissions. In the facts and circumstances of the case as referred above, there is no such questions require to be considered in the present second appeal.

There is no substantial question of law based on admitted fact as such in the present matter which required to be considered for the first time in this second appeal at the stage of final hearing. The substantial question of law which were formulated at the time of admission of the second appeal in question and the reasoning given above itself sufficient to reject the submission as raised by the appellant. There is no force and/or merit in such submission. There is no additional question of law as such which can be borne out from the admitted facts and circumstances referred above.

13. Taking all these into account and under the facts and circumstances of the case, the impugned judgment and order dated 30th November, 1988 passed in Civil Appeal No. 303 of 1984 is confirmed. The Second Appeal is, accordingly, dismissed. There shall be no order as to costs.

Sd/-

(ANOOP V. MOHTA,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

CIVIL APPLICATION NO. 2582 OF 1989

IN

SECOND APPEAL NO. 335 OF 1989

Smt. Thakubai Muralidhar Valunj ... Appellant.

Versus

Eknath Kisan Kashikedar & Ors. ..... Respondents.

Smt. S. B. Gunjal for the Appellant.

Mr. S. S. Pandit for Respondent Nos.1 and 2.

CORAM : ANOOP V. MOHTA, J.

DATED : 1ST DECEMBER, 2005.

P. C. :

In view of the reasoning given in the second appeal, this civil application is also dismissed and disposed off accordingly.

Sd/-

(ANOOP V. MOHTA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

CIVIL APPLICATION NO. 4189 OF 1989

IN

SECOND APPEAL NO. 335 OF 1989

Smt. Thakubai Muralidhar Valunj ... Appellant.

Versus

Eknath Kisan Kashikedar & Ors. ..... Respondents.

Smt. S. B. Gunjal for the Appellant.

Mr. S. S. Pandit for Respondent Nos.1 and 2.

CORAM : ANOOP V. MOHTA, J.

DATED : 1ST DECEMBER, 2005.

P. C. :

In view of the reasoning given in the second appeal, this civil application is also dismissed and disposed off accordingly.

Sd/-

(ANOOP V. MOHTA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

CIVIL APPLICATION NO. 1486 OF 2005

IN

SECOND APPEAL NO. 335 OF 1989

Smt. Thakubai Muralidhar Valunj ... Appellant.

Versus

Eknath Kisan Kashikedar & Ors. ..... Respondents.

Smt. S. B. Gunjal for the Appellant.

Mr. S. S. Pandit for Respondent Nos.1 and 2.

CORAM : ANOOP V. MOHTA, J.

DATED : 1ST DECEMBER, 2005.

P. C. :

In view of the reasoning given in the second appeal, this civil application is also dismissed and disposed off accordingly.

Sd/-

(ANOOP V. MOHTA, J.)